

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **DEC 05 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The director dismissed a subsequent motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the Texas Service Center.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as an information technology company. It seeks to permanently employ the beneficiary in the United States as a financial engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹

The appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The director's decision revoking the approval of the petition concludes that the beneficiary never intended to take employment with the petitioner upon his adjustment of status to that of a legal permanent resident.

The regulation at 8 C.F.R. § 205.2 reads:

- (a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS].

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the Notice of Intent to Revoke (NOIR) dated September 9, 2010, the director wrote:

A review of the beneficiary's circumstances shows that he formed the company under which he is now attempting to port, [REDACTED] approximately one week after the approval of his Form I-140. He departed the petitioning company to work for [REDACTED] in December after his Form I-485 application had been pending for 6 months, which is the period of time needed to benefit from the portability provisions of AC21.³ In short, it appears that while the petitioner had the intent to employ the beneficiary, the beneficiary did not have the intent to remain employed with the petitioner. The preponderance of the evidence would then indicate that he is ineligible to utilize the portability provisions of AC21 to adjust status.

...

Since he is no longer employed with the [petitioner], it would appear that the beneficiary no longer has a valid job offer.

In response to the director's NOIR, the beneficiary submitted a sworn statement indicating that he worked for the petitioner from 2001-2007; that he started his own company in 2005 to follow through on an idea for a web based software; and that he ported to his own company in December 2007 because he wanted to finish his master's studies at [REDACTED] and needed more flexibility with hours of work at the time.

The record contains the Form ETA 750A signed by the petitioner on July 30, 2003; the Form I-140 signed by the petitioner on January 28, 2005; a letter of intent signed by the petitioner on November

³ The director is referring to section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313). That section prescribes that "A petition . . . shall remain valid with respect to a new job if (1) the beneficiary's application for adjustment of status has remained adjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved." When a beneficiary changes jobs under the provisions of AC21, it is referred to as "porting."

1, 2006, indicating its continuing intention to employ the beneficiary in the position of financial engineer; an Internal Revenue Service (IRS) Form W-2 issued by the petitioner to the beneficiary indicating payment of wages in 2007 of \$40,167; the beneficiary's Form I-485 adjustment of status application filed June 6, 2007; materials indicating that the beneficiary formed a company in 2005; Form G-28 signed by the petitioner on June 15, 2011 authorizing the filing of a motion before the director; and Form G-28 signed by the petitioner on November 29, 2012 authorizing the filing of the current appeal.

In view of the beneficiary's porting to self-employment, the AAO recognizes the director's concern about the *bona fides* of the job offer and the beneficiary's intention to work for the petitioner. Nevertheless, the record does not establish that the petitioner did not intend to employ the beneficiary at the time of filing the application for labor certification, the petition for immigrant visa, or when he signed the letter of intent to employ in June, 2007. Further, the record does not sufficiently establish that because the beneficiary ported to his own company in December 2007 that he did not intend to work for the petitioner at the time that he filed the Form I-485 application to adjust status or before. The record does not establish good and sufficient cause to revoke the approval of the petition based on a finding that the job offer was not *bona fide*.

Nevertheless, it is unclear from the record whether the petition is approvable. The AAO will thus withdraw the decision of the director, and remand to the director to make a determination on whether the petitioner has established eligibility for the underlying immigrant visa classification. If the petition is not approvable, the director should issue a new NOIR specifically outlining the deficiencies of the petition, and give the petitioner the opportunity to respond to such concerns.

In view of the foregoing, the previous decisions of the director is withdrawn. The petition is remanded to the director for further consideration, and if appropriate, the issuance of a new NOIR. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within the allowable period of time. Upon review of all the evidence, the director will enter a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.

ORDER: The director's decision is withdrawn; the petition is remanded to the director for review and issuance of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.